



CITY OF DURHAM | NORTH CAROLINA

Date: January 21st, 2014

To: Thomas J. Bonfield, City Manager
Through: Wanda S. Page, Deputy City Manager
From: Bertha T. Johnson, Director of Budget and Management Services
Subject: Appeal of an Administrative Decision – Phillips Research Park Apartments

Executive Summary

On December 18th the Impact Fee Appeal Committee voted to deny the request for relief of \$108,624 in impact fees for the Phillips Research Park Apartments. Phillips Development and Realty (PDR) is appealing the decision pursuant to City of Durham Code of Ordinances § 30-87. The appeal request is attached.

Recommendation

To confirm the impact fees assessed by City staff against the Phillips Research Park Apartments because City Council concludes and finds as fact that the City of Durham Code sections 30-81 et. seq. have been correctly applied to the Phillips Research Park Apartments project.

Background

The development of the Phillips Research Park Apartments began in 2007. The original site plan application was filed in late November 2007 with subsequent approval on June 19, 2009. When the site plan application was filed, a neighboring property owner, CRLP Durham LP, denied a required cross access to the property. One requirement of CRLP Durham LP's development was that they provide cross access to the Phillips Research Park Apartments (Ellis Road, LLC) site. CRLP Durham LP attempted to block a shared access road adjoining the Phillips Research Park Apartments.

On September 29, 2008, Steven L. Medlin, Planning director, provided written notification to CRLP Durham LP's legal representative that stated Colonial Grand Apartments was in clear violation of the condition set forth in Condition 5 of its site plan approval which requires that cross access be provided and maintained between the tracts. CRLP Durham LP decided to appeal the director's administrative decision to the Board of Adjustment. Pursuant to the Unified Development Ordinance Section 3.15.7 the filing of the appeal application stays all proceedings in furtherance of the action being appealed and prevented the final approval of the site plan until such time as the appeal was heard and decided by the Durham Board of Adjustment.

On March 5, 2009 the Board of Adjustment heard the case and voted to uphold the Planning director's administrative decision with their final order being issued in April 2009. CRLP Durham LP appealed the Board of Adjustment's decision to the NC Superior Court, which upheld the Board of Adjustment's action. CRLP Durham LP appealed the Superior Court ruling to the N.C. Court of Appeals, which subsequently dismissed the appeal on March 1, 2011.

Mr. Phillips, the Managing Director of PDR, was advised at the time of site plan approval, pursuant to advice from the City Attorney's office, that as a condition of approval by the Development Review Board, that the site plan approval was based in part upon an administrative decision that was under appeal in the courts, and that development under the

approved site plan could occur, but the developer would assume all risk and liability if it chose to proceed.

Phillips secured financing from US Bank in April 2008 for the development loan to build 344 apartment units. The financing was contingent on certain construction deadlines being met. According to Mr. Phillips, as a result of the appeal, the deadlines could not be met and the bank defaulted on the loan. Since 2011, Mr. Phillips has worked through litigation with the bank to get the loan resolved and to obtain new financing.

The City's impact fees increased in July 2009. Due to this fee increase the fees owed by Phillips increased by \$108,624.

Mr. Phillips contends that had this development not been tied up in litigation with CRLP Durham LP, PDR would have been able to secure site plan approval and apply for the required building permit in 2008 and pay the impact fee rate in existence at that time. They are asking to be considered for the 2008 impact fee rate since they were put in this position through no fault of their own.

Pursuant to Code § 30-84(a), impact fees "shall be determined at the time of building permit application" Additionally, Code § 30-84(d)(9) states that in "the event that the impact fee schedule is changed, the city will assess the impact fee based on the fee schedule in effect at the time the developer submits a completed building permit application in a form approvable by the city" On May 5, 2008, Council adopted Ordinance #13592 (attached) which implemented impact fee increases to take effect on both July 1, 2008, and then later on July 1, 2009. The developer initially submitted its building permit application for this project on November 23, 2010 and then requested that its application be voided on September 7, 2011 due to inconsistencies between the approved site plan (approved on June 19, 2009) and its submitted building plans. Pursuant to the developer's request, the initial building permit application was voided. The developer submitted a new building permit application on October 17, 2011. Building permits were ultimately issued on February 24, 2012. Thus, the impact fee schedule at issue in this matter had an effective date of July 1, 2009 and the developer's successful building permit application was not submitted until October 17, 2011. Based upon the language in Code §§ 30-84(a) and 30-84(d)(9), Inspections correctly applied the July 1, 2009 impact fee schedule to this project since the developer did not submit a complete "building permit application in a form approvable by the city" until October 17, 2011 over two years after the July 1, 2009 impact fee schedule became effective.

On, November 12th, PDR filed an appeal with the City Manager. On December 18th, the Impact Fee Appeals Committee ("Committee") heard PDR's appeal. The Committee consists of Wanda S. Page, representing the City Manager's Office, Gene Bradham and Roy Brockwell, representing the Inspections department, Wesley Parham, representing the Transportation department and Bertha Johnson, representing the Budget and Management Services department. By letter, dated January 6, 2014, the Committee informed counsel for PDR that PDR's appeal was unanimously denied because the impact fees assessed were correct pursuant to the City's impact fee ordinances. See *Durham City Code* §§ 30-81 *et. seq.*

Issues and Analysis

The site plan for the Phillips Research Park Apartments was not approved by the Development Review Board until June 19, 2009. The Impact Appeal Committee determined that the ordinance was applied as adopted. The committee does not have the authority to reduce the fee.

PDR now appeals the Impact Appeal Committee's determination to City Council pursuant to Code § 30-87(c-e). The Manager's Office has provided appellant notice of this hearing as required by Code § 30-87(d). City Council shall hear from appellant, interested parties, the Manager's Office, and applicable City departments, and shall then make findings of fact and conclusions that explain the basis for its determination to either confirm or amend the impact fees currently assessed by the City.

Attachments

- Appeal Letter to City Manager
- Steve Medlin, Durham City/County Planning Director - Letter to Colonial Grand Apartments
- Impact Fee Ordinance
- Chronological Summary of Site Plan And Administrative Appeal Timeline